



November 4, 2013

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RE: Administrative Appeal of Bybee Vegetation Management Project

Appellant:  
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American Forest Resource Council (AFRC) is appealing the Bybee Vegetation Management Project (Bybee Project) Decision signed on September 17, 2013 by Robert G. MacWhorter, Forest Supervisor of the Rogue River-Siskiyou National Forest, pursuant to 36 CFR 215. The legal notice of the Decision was published in the Medford Tribune September 20, 2013. AFRC submitted substantive comments during the comment period and is eligible to appeal under the requirements specified in 36 CFR 215.6.

AFRC is appealing the Decision because the Responsible Official failed to adequately justify why he did not adopt the Proposed Action (Alternative 2) and why he chose an action alternative different from any described in the Environmental Assessment. The September 17, 2013 Decision is arbitrary and capricious, does not fully meet the Purpose and Need of the project and

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should be replaced with one that is supported by the analysis done in the Environmental Assessment.

## **APPELLANT’S INTERESTS**

American Forest Resource Council (AFRC) is an Oregon nonprofit corporation that represents the forest products industry throughout Oregon, Washington, Idaho, Montana, and California. AFRC represents over 50 forest product businesses and forest landowners. AFRC’s mission is to create a favorable operating climate for the forest products industry, ensure a reliable timber supply from public and private lands, and promote sustainable management of forests by improving federal laws, regulations, policies and decisions regarding access to, and management of, forest lands. Many of our members have their operations in communities adjacent to the High Cascades District, and the management on these lands ultimately dictates not only the viability of their businesses, but also the economic health of the communities themselves. The state of Oregon’s forest sector employs approximately 76,000 Oregonians, with AFRC’s membership directly and indirectly constituting a large percentage of those jobs. Rural communities, such as the ones affected by this project, are particularly sensitive to the forest product sector in that more than 50% of all manufacturing jobs are in wood manufacturing.

## **BACKGROUND**

The Environmental Assessment for the Bybee Project was published January 2013. Three action alternatives were analyzed and based on this analysis, it was determined that Alternative 2 best met the Purpose and Need of the project. The stated Purpose and Need is:

*The purpose and need of this project is to implement the Rogue River Forest Plan, as amended. Specifically, this project is designed to address the following: 1) improve stand conditions, diversity, density, and structure to increase forest resiliency and overall forest health; 2) provide for a sustainable supply of timber products that contribute to probable sale quantity (PSQ) of commercial timber and other commodity outputs; and 3) reduce the risk to forest resources from high-intensity fire.*

Because Alternative 2 best met the Purpose and Need of the project, it was listed as the Proposed Action. The chart below is a summary of the three action alternatives.

	Alternative 2	Alternative 3	Alternative 4
Timber harvest treatments (acres)	3,622	2,990	2,915
Natural fuels reduction treatments (acres)	467	467	467
Temporary roads (miles)	12.9	9.4	2.3
Decommissioned roads (miles)	5.4	5.4	5.4
Estimated Volume (mmbf)	45	34	10

The stands within the project area are in desperate need of management. The Environmental Assessment states that "[O]ut of the 16,215 acres of the project planning area, 5,522 acres (34 percent) are overstocked and 6,087 acres (37 percent) are fully stocked." It goes on to explain the consequences of this condition.

*When a stand is overstocked, stress on the trees increases through competition for water and space and individual tree growth decreases. These overstocked stands have a high incidence of Douglas-fir dwarf mistletoe, insect infestations, root rot, and other diseases. Douglas-fir dwarf mistletoe is commonly found throughout the project planning area. Severity levels are high in many locations. Douglas-fir dwarf mistletoe infection results in growth loss, top kill, distortion, mortality, and predisposition to infection and attack by other agents. The growth reduction and mortality associated with dwarf mistletoe can lead to radically different forest structures, densities, and productivity levels in infected stands than in uninfected stands on similar sites. In addition, beetle epidemics, root diseases, and blister rust were all observed in scattered areas across the project planning area. In most cases, root diseases were isolated to smaller patches with the exception of a few stands that were mostly or completely infected with Armillaria root disease or a combination of root rot pathogens. In some of the overstocked stands, it was observed that previous beetle infestations had already killed many of the pines that existed within the stand. It is likely that more disease would be discovered when more detailed examinations occur during implementation. Overstocked stands can also increase the potential for high-intensity wildfires.*

The Environmental Assessment also describes the "Desired Future Condition" for the project area.

*The overall desired future condition for the Bybee project planning area is to have a decrease in overstocked stands, reduced susceptibility to insect and disease outbreaks, more productive stands, commercial timber and other commodity outputs, and a reduced risk to forest resources from high-intensity fire. Stand vigor should also be increased as released trees develop into larger trees sooner. Tree species, age, and structural diversity should be maintained or enhanced.*

*Fuels loads in the Bybee project planning area would be decreased to reduce the risk of unacceptable adverse effects of wildland fire to forest resources in the area. After fuels treatments are implemented in the project planning area, unplanned wildland fires would be able to move through the area with less likelihood of destroying valuable forest resources.*

The Environmental Assessment also describes the consequences of not treating stands within the project area.

*If no action is taken, tree growth rates would continue to decline and natural processes that affect tree vigor and changes in stand structure would continue. Tree mortality occurring within known root rot pockets would continue. Many stands are currently overstocked; site resources are being fully utilized and tree competition is apparent. High tree density increases competition for water, nutrients, and light. The effects of overstocked stands include decreased growth, increased rates of tree mortality, higher risk for insect and disease attacks, and a higher risk for stand replacing fires. Areas affected by root rot would not be regenerated with planted native seedlings.*

***Without thinning***, dense stands would remain at current stocking levels. Overly dense stands result in lower growth rates, smaller individual tree size, or both. High tree densities also increase competition which results in stressed conditions decreasing the overall health and vigor of a stand. As previously discussed, stressed and overstocked conditions increase the occurrence and impacts of most tree pathogens. Overly dense stands also increase the risk of damage from wildfires.

***Without group selection treatments***, pockets of root rot infestations would continue to spread at current rates. Because natural regeneration in these pockets is often problematic, these areas would not likely develop large mature trees. The most likely scenario is that susceptible species would seed into these openings, grow for several years, and then die back as their roots come into contact with infected root systems from the residual trees. As the root disease spreads and kills trees, snags and downed wood levels would increase dramatically which can increase beetle problems and create problematic fuel loads. In the absence of this treatment, stands would also retain their current age class distribution. Group openings also allow for the regeneration of species that are more shade intolerant, such as pines, which would not be very likely without this treatment.

***Without shelterwood with reserves treatments***, these stands would die and likely regenerate with the same susceptible species. In this case, the trees would grow for a few years until they contract the fungus and die back. This is the same as described for the root rot pockets, only over a larger area.

***Without overstory removal treatments***, young trees growing below mistletoe infected overstory trees (of the same species) would become heavily infected with mistletoe. This would result in a slow growing and deformed stand of trees that would likely die before reaching maturity.

Based on the analysis documented in the Environmental Assessment, the USFS concluded:

*Alternative 2 would implement the Rogue River Forest Plan, as amended. This alternative is designed to address and maximize attainment of the purpose and need outlined in chapter I to improve overall forest health, while providing for a sustainable*

*yield of commercial timber and other commodities, and reduce the risk to forest resources from high-intensity fire.*

The Environmental Assessment clearly demonstrates that Alternative 2 should have been adopted by the Responsible Official. Any deviations from Alternative 2 need to be clearly documented in the Decision Notice and must be justified by showing how these deviations strengthen the project to attain the Purpose and Need. The Responsible Official failed to do so and arbitrarily chose an alternative that will not fully meet the Purpose and Need, not lead to the Desired Future Condition and will lead to the negative environmental consequences documented in the No-Action Alternative as well as the negative social and economic impacts not disclosed.

### **SPECIFIC APPEAL POINTS**

**1. The Responsible Official fails to document in the Decision Notice why Alternative 3 was selected over Alternative 2 and how selecting this Alternative will better meet the Purpose and Need.**

While Alternative 2 was developed to maximize the achievement of the Purpose and Need while meeting all rules, laws and regulations, Alternative 3 was developed "...to address several of the key issues identified during scoping." All of these issues were sufficiently analyzed and addressed in Alternative 2. The fact that certain special interest groups raised "concerns" over issues does not mean that these concerns are valid ecologically or outweigh the Purpose and Need. Obviously, since the Environmental Assessment selected Alternative 2 as the Proposed Alternative, these "concerns" were not found to be significant ecologically.

The only reason given by the Responsible Official for not choosing Alternative 2 is that he "...did not select this alternative because I believe that the modified alternative 3 best balances the purpose and need and protects the environment." The duty of the Responsible Official is to implement the Forest Plans support projects that move the Forest towards the desired future condition and most fully accomplishes the Purpose and Need. The responsible official's so called "balancing" is totally arbitrary and subjective. No further documentation or explanation of what was "balanced" and how this was done is provided. Alternative 3 was created to address the "concerns" of a vocal minority. Selecting this alternative is therefore merely capitulating to their whims.

The stated changes made between Alternative 2 and Alternative 3 are "14 units (28, 29, 31, 38, 47, 49, 56, 52, 54, 56, 59, 67, 68, and 71) covering 632 acres were dropped for treatment under this alternative. Twenty-four units (1, 7, 8, 12, 17-19, 21-25, 32-34, 36, 39, 43, 48, 55, 58, 72, 73, and 75) covering 1,037 acres would receive a different treatment than that proposed under alternative 2 (proposed action)." The estimated volume for Alternative 3 is also 11 mmbf lower than Alternative 2, thus reducing the achievement of the second Purpose and Need, *provide for a sustainable supply of timber products that contribute to probable sale quantity (PSQ) of commercial timber and other commodity outputs.*

All of these changes reduce the accomplishment of meeting the Purpose and Need of the project. The negative consequences of not treating 1,601 acres are documented in Environmental Assessment and reproduced above. Changing the treatment on 1,037 acres will have similar negative impacts.

Below is a summary of the major effects of choosing Modified Alternative 3 over Alternative 2.

	Alternative 2	Decision	Difference
Timber harvest treatments (acres)	3,622	2,021	-1,601
Natural fuels reduction treatments (acres)	467	467	0
Temporary roads (miles)	12.9	7.9	-5
Decommissioned roads (miles)	5.4	5.4	0
Estimated Volume (mmbf)	45	27	-18
Estimated Revenue (300\$/mbf)	\$13,500,000	\$8,100,000	-\$5,400,000
Estimated Job Creation (18/mmbf)	810	486	-324
NEPA Cost Per MBF (\$500,000)	\$11.11	\$18.52	\$7.41

As one can see, the change from Alternative 2 has huge social and economic impacts as well as the negative ecological impacts discussed above. At an estimated sale value of \$300/mbf, the government will lose \$5.4 million dollars in revenue. Counties would lose their 25% share of this (\$1.35 million) as well as losing the potential of employing 324 people. AFRC and other national trade associations have been working with the Washington and Regional Offices on ways to increase efficiencies. One of the most effective and widely supported efforts is to maximize the acres treated and volume generated by each NEPA document since this represents a significant portion of the total timber preparation cost. Assuming a cost of \$500,000 for the NEPA process, the change from Alternative 2 to Modified Alternative 3 represents a 67% increase in preparation cost per thousand board feet. This is totally contrary to National and Regional direction. The Rogue/Siskiyou has been complaining for years that they do not receive enough money to support selling their Northwest Forest Plan PSQ. Forgoing the opportunity to treat 1,600 acres and losing 18 million board feet is one of the major reasons why their sale preparation costs are so high.

One of the key differences between Alternative 2 and Alternative 3 is modification of the silvicultural treatment on 16 units covering 719 acres for elk "thermal and hiding" cover. The Oregon Department of Fish and Wildlife (ODFW) which is responsible for managing Oregon State's elk herds, commented on this proposal on February 12, 2012. They state:

*ODFW believes that there is more than sufficient thermal and hiding cover in the project area and that adjacent Crater Lake National Park provides additional hiding and thermal cover.*

*....the existing hiding cover negates the need for retaining hiding and thermal cover patches, especially at the expense of forage creation.*

*ODFW recommends that the silvicultural and fuel treatments described in Alternative 2 would have the most benefit for deer and elk. We do not support modifying treatment on 16 units covering 719 acres of thermal or hiding cover as described in Alternative 3.*

By choosing Alternative 3, the Responsible Official is ignoring the guidance given by the State officials responsible for managing deer and elk herds. Instead, he is making the decision based on "concerns raised in the scoping process" by a vocal minority who are neither experts in the field or responsible for managing these herds.

The Responsible Official fails to disclose why Alternative 3 was chosen over Alternative 2. All of the reasons given in the Decision Notice are generic and could apply to any alternative. Nowhere does the Responsible Official disclose what had changed between the decision to choose Alternative 2 as the Proposed Alternative in the Environmental Assessment and the decision to choose Alternative 3 in the Decision Notice.

*I have decided to implement alternative 3 with some modifications. This decision is based on information contained in the project record, including the Bybee Vegetation Management Project EA and effects analysis described in chapter III, the resource specialist reports, the management requirements of the applicable laws and policies, the design features described in the Bybee EA and DN/FONSI Attachment 1 – Implementation Plan, and the comments received during the public involvement process for this project.*

Rejecting an alternative that meets the purpose and need is arbitrary and capricious. *See e.g., Nat. Parks & Consv. Assn. v. BLM*, 606 F.3d 1058, 1072 (9th Cir. 2010).

## **2. The Responsible Official fails to document in the Decision Notice why the modifications he made to Alternative 3 will better meet the Purpose and Need**

Ten units totaling 465 acres and representing 7.2 million board feet timber were dropped from Alternative 3. Five of these units were dropped based on a "Silviculture Report Supplement" done on August 25, 2013, a full eight months after the Environmental Assessment was completed and a mere three weeks before the Decision Notice was signed and not subject to public comment. NEPA requires that documents that are fundamental to the decision be addressed in the body of the EA or EIS. The responsible official's failure to do so violates NEPA. *See, Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000). Perhaps coincidentally, these five units coincide with those opposed to by some environmental factions. While the report tries to justify dropping the units because treatment is not needed for some select environmental reasons, it fails to address the consequences of removing these units on meeting the second and third Purpose and Need. If these latter reasons are taken into

consideration, the benefits of treating these stands clearly outweigh the proposition that these stands are not in need of treatment.

The Responsible Official also changed the silvicultural treatment being applied to the other five units from a commercial thinning to a non-commercial thinning. The reason for doing this is given as to "reduce density in the overstocked understory and provide an opportunity to conduct soil restoration efforts on previously compacted soils." There is no explanation as to why these two things could not be accomplished under the original silvicultural prescription and why a change was needed.

**3. The Responsible Official fails to document in the Decision Notice why treatment of the riparian reserves was dropped on 20 units.**

Nowhere in the Decision Notice does the Responsible Official discuss why 161 acres representing 2.4 million board feet within the Riparian Reserves in 20 units were removed from treatment. The Environment Assessment concluded that thinning inside and outside of Riparian Reserves would have no negative impacts and have a positive effect on creating large woody material in the future.

*Based on the required project design criteria, best management practices, and mitigation measures, no adverse effects from coarse sediment as a result of thinning and prescribed burning would be expected. There would be no increase in coarse sediment delivery to a stream from thinning or prescribed burning activities.*

*The portions of the Riparian Reserves proposed for thinning and prescribed burning have been harvested in the past. Since much of the overall project planning area has been harvested, there is a shortage of large wood for recruitment. Riparian Reserve thinning would increase tree growth and lessen the time needed to establish future large wood delivery. Both thinning and fuels treatment would lower the likelihood of a stand replacement fire in the overstocked Riparian Reserves.*

The decision by the Responsible Official to cancel thinning in the Riparian Reserves in 20 units is arbitrary and will have a negative impact on these areas.

**REQUESTED RELIEF**

- Provide for public comment on the "Silvicultural Report Supplement" done August 13, 2013;
- Issue a new Decision Notice which adopts Alternative 2 to fully meet the Purpose and Need.

**RESOLUTION MEETING REQUESTED**

AFRC requests a dispute resolution meeting pursuant to 36 CFR 215.17.



In the event multiple appeals are filed on this decision, AFRC respectfully requests that the resolution meeting be held as soon as possible with all appellants present. AFRC believes that having all appellants together at one time, though perhaps making for a longer meeting, in the long run will be a more expeditious process to either resolve appeal issues or move the process along.

Thank you for your efforts on this project and your consideration of this appeal. AFRC looks forward to our initial resolution meeting within the next two weeks.

Please contact our representative, Ross Mickey, at the address and phone number shown above, to arrange a date of the resolution meeting.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Tom Partin", with a stylized flourish extending from the end.

Tom Partin  
President

cc: Robert G. MacWhorter, Rogue Siskiyou National Forest Supervisor